IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-641

MAURO CANTU,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the United States:

Mauro Cantu, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on October 3, 1977.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at ___ F.2d ___, and is printed in the appendix hereto, infra, page 2a. The judgment of the United States District Court for the Western District of Texas is not printed.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit (Appendix A, infra, page 1a) was entered on August 22, 1977. A timely petition for rehearing was denied on October 3, 1977 (Appendix C infra, page 12a). The jurisdiction of the Supreme Court is invoked under 28 U.S.C.A. §1254.

QUESTIONS PRESENTED

(ONE)

The question of selective, discriminatory prosecution is a question that has appeared in cases involving Selective Service Boards. *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973), peace demonstrations, *United States v. Crowthers*, 456 F.2d 1074 (4th Cir. 1972), the census bureau, *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972), and in the instant the Immigration & Naturalization Service, *United States v. Cantu*, ___ F.2d ___ (5th Cir. 1977). The requisites and decisions of the Fourth, Seventh, and Ninth Circuits are distinct from that of the Fifth in the instant, where this question was presented. This creates a conflict between the decisions of the various aforementioned circuits. Said conflict creates a controversy in need of amelioration and determination by this Honorable Court.

(TWO)

In conjunction with the above-mentioned conflict between those jurisdictions mentioned is the matter of the validity of the search warrant which is supported, allegedly, by an affidavit whose content equals neither the requisites of the two-pronged test of *Aguilar v. Texas*, 378 U.S. 108, 12 L.ed. 2d 723, 84 S.Ct.

1509 (1964) nor the requisites and test as set out by a recent case coming from the Second Circuit, *United States v. Karathanos*, 531 F.2d 26 (2d Cir. 1976) cert. denied, 428 U.S. 910, 47 L.Ed.2d 831, 96 S.Ct. 1566 (1976). Along with this is the question emanating from the decision in the case of *United States v. Brignoni-Ponce*, in which roving search patrols in border areas could stop vehicles only if there existed specific articulable facts together with inferences therefrom that reasonably warranted suspicion that the vehicle contained aliens illegally in the country. The question emanating then is whether the absence of *founded suspicion* based on *specific articulable facts test* renders unconstitutional INS Area Control Operations at non-border points.

(THREE)

Whether, in light of Senate Report 1515, the basis for the 1952 Immigration and Nationality Act, suggesting that the statute here involved (8 U.S.C.A. § 1324) confines itself to activities which are part of the smuggling process, a correct interpretation has been rendered. This involves an important question of federal law which has not been but should be settled by this court.

(FOUR)

The holding of the Fifth Circuit below, is tantamount to an erosion of Petitioner's First, Fourth and Fourteenth Amendment Rights. Due process was denied by a finding of guilt where the prosecution failed to establish a legal nexus between the alleged violation of the statute and the actions of the petitioner.

STATUTE INVOLVED

8 U.S.C.A. § 1324

(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who —

(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise.

(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports or moves, or attempts to transport or move, in furtherance of such violation of law;

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or

(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of — any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to

enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000.00 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however,* That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

(b) No officer or person shall have authority to make any arrest for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws.

STATEMENT OF THE CASE

Petitioner MAURO CANTU, Appellant below, was charged by indictment with conspiracy to attempt to shield illegal aliens from detection and with two counts of attempt to shield illegal aliens from detection in violation of Title 18 United States Code, Section 371 and Title 8 United States Code, Section 1324 (a) (3).

Appellant below, was tried before a jury and found guilty of all three counts of the indictment as charged.

The Court sentenced Appellant to a five (5) year probated sentence and assessed a fine of $3,000.00.

Mauro Cantu properly and timely gave notice of appeal to the United States Court of Appeals for the Fifth Circuit.

The holding of the trial court was affirmed by the Fifth Circuit on August 22, 1977. The opinion rendered is printed in Appendix B hereto.

Petitioner, Mauro Cantu, timely filed a Petition for Rehearing, and for En Banc.

On October 3, 1977, the Fifth Circuit entered an order denying the Petition for Rehearing En Banc. (Appendix C, infra, page 12a).

Within the statutory time limits, Petitioner Mauro Cantu filed a Motion to Stay Issuance of Mandate with the Fifth Circuit, as a prerequisite to the filing of the instant Petition for Writ of Certiorari. Said Stay was granted allowing Petitioner to Petition for Writ of Certiorari.

REASONS FOR GRANTING WRIT

The question posed is important to not only the Defendant but to every citizen concerned with human rights as well as with the rights of every citizen.

Today's awareness of human rights, compels a decisive opinion by this Supreme Court by which individuals may safety gauge their activities in human rights endeavors.

The lower courts, trial and appellate, have found the Petitioner guilty of activities which the evidence

presented did not substantiate. When in a Democracy, individuals are subjected to laws so broad and vague as to encompass non-criminal conduct, as in the instant, it becomes necessary for this Court of last resort to secure for the Petitioner the egalitarian tenets it has historically interpreted and preserved.

Question One

If it please the court, among his numerous legal assertions and substantiating authorities the Petitioner, has cited to the case of *United States v. Falk*, 479 F. 2d 616 (7th Cir. 1973).

The political climate serving as background for the case of *Falk*, was one in which existing laws allowed for selective, discriminatory prosecution, that is to say that those individuals of conviction contrary to conscription found themselves susceptible to political suppression, and persecution. This persecution of the ordinary resulted from the involvement of those individuals such as Falk in activist organizations. Falk was among those critical of the conflict in Viet Nam, and particularly to the conscription which involuntarily sought to make him a party thereto. Consequently, even though many others likewise criticized the foreign policy of the United States at that time, Falk because of his activist endeavors was singled out for prosecution.

As has been pointed out repeatedly, Selective prosecution while a viable weapon for vendetta is nonetheless an accepted part of our judicial system. *Oyler v. Boles*, 368 U.S. 448, 456, 7 L.Ed.2d 446, 82 S.Ct. 501 (1962). However, the United States Court of

Appeals for the Seventh Circuit found as have the Fourth and Ninth that it is impermissible, where provable, to prosecute for what is tantamount to prosecution for the assertion of cherished First Amendment Rights. *United States v. Falk*, (Supra); *United States v. Crowthers*, (Supra); *United States v. Steele*, (Supra).

Falk was an active member of a draft counseling organization The Chicago Area Draft Resisters. In his pretrial motion and again in his offer of proof Falk asserted that the prosecution against him for violation of the statute was brought not because he had violated the statute but to punish him for and stifle his and other's participation in protected First Amendment activities in opposition to the draft and the conflict in Viet Nam.

The Seventh Circuit in the case of *Falk*, stated:

> . . . just as discrimination on the basis of religion or race is forbidden by the Constitution so is discrimination on the basis of the exercise of protected First Amendment activities, whether done as an individual or as in this case, as a member of a group unpopular with the government. (Id. at 620).

Another like case being that of *United States v. Steele*, 461 F. 2d 1148 (9th Cir. 1972), involved a situation in which the defendant argued that he had been deliberately selected for prosecution because of his participation in a census resistance movement.

Appellant Steele in his cause of *United States v. Steele*, (supra), was convicted for (purportedly) violating a statute by refusing to answer questions on a census form. More honestly, it turns out Steele was convicted for being a vocal participant in a census resistance movement.

Among other vocal undertakings by Steele were, a press conference, a protest march, and the distribution of pamphlets. The Regional Technician for the Census in Hawaii described Steele and three other resistors as "hard core resisters" and had background dossiers completed on them.

Steele attempted to prove that many others had acted similarly except as to the vocal resistance, and there had been no prosecution. Steele then endeavored to learn how many others though not vocal had similarly withheld requested information. The government proved most uncooperative, replying that such information was not available. That Appellant located six other persons who had refused to complete the census form, but had not been vocal in their resistance. None of those was recommended for prosecution. Such actions or inactions establish the principle that equal protection of the law is denied when a valid statute is enforced discriminatorily. The even handed application of the law was apparently abandoned, there as it was in the instant. An analogous situation existed in the case at bar. Persons were located by Appellant to substantiate selective discriminatory prosecution.

Petitioner Cantu, is a known vocal activist in the Chicano movement. Cantu is equally well known for

his work with the organization T.U. C.A.S.A., an organization which lends aid to undocumented workers. Cantu has been vocally critical of the Immigration and Naturalization Service and as such was apparently singled out for persecution. Cantu at the trial of his cause raised the allegation that others, named, had acted as he had and gone further in dealing with illegal aliens, but were not vocally critical and had not been prosecuted. (SF 316-317) (SF 23).

As in the case of *Steele*, the government in the instant offered no explanation other than prosecutorial discretion, for its selection of defendant Cantu. Sufficient evidence which created a strong inference of discriminatory prosecution was raised, the government was required to explain it away, if possible, by showing that the selection process actually rested upon some valid ground — this was not done.

The Falk Court reasoned that the particular circumstances of that case compelling the government to accept the burden of proving nondiscriminatory enforcement of the law were several. As examples that Court points out that Falk was actively involved in advising others on methods of legally avoiding military service and in protesting American actions in Viet Nam. Those same two particular circumstances existed in the case of Mauro Cantu, that is he advised undocumented workers and was involved in protests against the INS. Although purportedly in Falk and Steele the burden shifted to the government to prove nondiscriminatory enforcement of the law, there were some factors which aided those two Appellants in their efforts.

In the case of *Falk*, it became known that the Assistant United States Attorney knew of Falk's draft counseling activities.

Appellant, Steele, in his case, single-handedly gathered the necessary proof to substantiate his allegations of selective discriminatory prosecution.

Petitioner Cantu did not have those tangible factors, besides witnesses there was no tangible proof to present, but a lack of tangible elements should not distinguish this case where witnesses substantiated Cantu's assertions. Steele was able to prove on his own that the only people being prosecuted, four (4), were all known, vocal, dissenters; participants in the census resistance movement. The Ninth Circuit citing the case of *Yick Wo v. Hopkins*, 118 U.S. 356, 30 L. Ed. 220, 6 S.Ct. 1064 (1886) stated that the case of *Yick Wo* established the principle that equal protection of the law is denied when state officials enforce a valid statute in a discriminatory fashion. See Steele at 1151.

Mauro Cantu sought to present the necessary evidence to support his allegations of selective discriminatory prosecution. Those efforts were thwarted, however, by the lower courts, by denial of the pretrial conference. However, he, Mauro Cantu, did present witnesses to substantiate assertions made.

The Petitioner sought tirelessly to obtain evidence substantiating his selective, discriminatory allegations, through a number of Discovery Motions, all denied (R-Vol. 1, p. 106) (R-Vol. 1, p. 70, 97 overruled at p. 138, 139).

Appellant-Petitioner then sought to raise the issue of selective discriminatory prosecution by means of a Pre-trial Conference, this too was denied. The best efforts of the Petitioner to present evidence of selective, discriminatory prosecution were swept aside by both the trial court, and the Appellate Court. *United States v. Mauro Cantu*, ___ F.2d ___, opinion at 5413.

In the written opinion by the Appellate Court for the Fifth Circuit, with regard to the pretrial conference it was stated:

> "The citation to Falk is inapposite, since in that case the remand was for evidentiary hearing on Falk's allegation of discriminatory prosecution." (at 5413, ___ F.2d ___ (5th Cir. 1977) (Appendix B, infra, page 10a).

The Petitioner did file a Motion for a Pretrial Conference. The Order denying said conference referred to this request as one for a pretrial hearing (R. ___).

Whatever name be affixed or applied to the Motion which Appellant requested the purpose is one with the request for a hearing granted to Falk (supra at 623) at which to develop the facts to support his allegations of selective, discriminatory prosecution.

Appellant Cantu asserts to this Honorable Supreme Court as he did to the lower courts, that he, complied with the requirements set in Falk. Those requirements are (1) Appellant must allege intentional, purposeful discrimination, and (2) presents facts sufficient to raise a reasonable doubt, about prosecutorial purpose.

The allegations were made and facts were presented (Tr. 314).

Jurisdictions other than the Fifth Circuit have ruled that in situations similar to that of Cantu, in the instant, that sufficient facts had been presented to merit a pretrial conference, or hearing.

Fourth Circuit — *United States v. Crowthers*, 456 F. 2d 1074 (4th Cir. 1972);

Seventh Circuit — *United States v. Falk*, 479 F. 2d 616 (7th Cir. 1973);

Ninth Circuit — *United States v. Steele*, 461 F. 2d 1148 (9th Cir. 1972).

Question Two

The Second Circuit, rules contrary to the holding in the case at bar, in the case of *United States v. Karathanos*, 531 F. 2d 26 (2d Cir. 1976).

The case of, Karathanos, involved a search of Steve's Pier One Restaurant in Bayville, N.Y.

A search warrant was issued after an INS investigator swore in an affidavit that he had reason to believe illegal aliens were on the restaurant's premises. As in the instant case the two-pronged test of Aguilar, was not met. That test is that (1) the facts are sufficient to satisfy a reasonably prudent detached and neutral person that a crime is being committed or evidence of it kept on the premises to be searched and (2) that the informants information has been obtained

by him in a reasonably reliable way. Assuming that the alleged illegal aliens were at the restaurant, that fact would not comport with the first requirement. The Statute (8 USCA 1324 (a) (3)) specifically excludes employment, the mere presence of aliens is neither a crime nor conclusive proof of illegal entry into the United States. (Id. at 30).

In the instant the affidavit never establishes how the informant obtained his information, aside from the broad assertion, that numerous complaints were received. The affidavit's statement that during the past 6 years illegal aliens arrested were employed or claimed employment at Petitioner's Restaurant would not remedy its failure to establish how the informant obtained his information. (Id. at 31); *United States v. Harris*, 403 U.S. 573, 29 L. Ed. 723, 91 S. Ct. 2075 (1971).

The addition of a recital of past criminal activity does not serve as an acceptable substitute for probable cause standards that have not been met. *United States v. McNally*, 473 F. 2d 934, 938-939 (3d Cir. 1973). The Second Circuit Court in Karathanos, clearly reasoned that if such recital could remedy the deficiency any tip, no matter how unreliably obtained would suffice to allow a search provided the owner of the premises had a record of prior similar criminal offenses (Id. at 32).

In the case of *Karathanos*, the aliens resided in the basement of the restaurant (Id. at 29). In the instant, the alleged aliens were alleged only to be in the employ of Appellant Petitioner, Cantu. (Tr. 75).

Warrant in hand INS agents searched the restaurant and arrested seven illegal aliens on the premises in the case of *Karathanos*, (Id. at 29).

In its reasoning the Court in Karathanos stated that statements to the informant by other aliens that they were illegally in the United States would have sufficed to support a holding that the information was reliably obtained (Id. at 30), e.g., *United States v. Sutton*, 463 F. 2d 1066, 1068 (2d Cir. 1972). However, the Court went on, while co-workers and bunkmates may exchange considerable amounts of information, it can hardly be assumed that living in fear of arrest and deportation, illegal aliens would have revealed their alleged status to a stranger . . ." (Id. at 30).

It was further held, that there is no necessary connection between a person's physical, linguistic characteristics . . . and the legality of his status . . . (Id. at 30). See *United States v. Brignoni-Ponce*, 422 U.S. 513, ____L.Ed.2d ____, 95 S.Ct. 2582 (1976), *United States v. Mallides*, 473 F. 2d 859, 860 (9th Cir. 1973).

Regarding the affidavit, the *Karathanos* Court stated that supporting detail was lacking, in that inter alia the affidavit, "furnishes no indication of their nationality, of how they came into the country, or indeed any statement about them other than their number and the conclusion about their illegality." (Id. at 31).

The instant case presents the same missing factors in the affidavit involved, under like circumstances the Karathanos court held that the affidavit fails to state facts sufficient to indicate probable cause to search.

(The search warrant was therefore improperly issued — Id. at 32).

The Supreme Court has specifically ordered the exclusion of evidence even when the unconstitutionality of the search resulted only from what might be termed a magistrate's error of judgment in determining probable cause (Id. at 33). See, *Aguilar v. Texas*, (supra), *Giordenello v. United States*, 357 U.S. 480, 2 L. Ed. 2d 1503, 78 S. Ct. 1245 (1958).

The Affidavit was supported in Karathanos, by the statement of an individual allegedly living with the aliens. In the instant, nothing that concrete can be presented to substantiate the affidavit. The circumstances are too similar, the issues too close, the conclusions inexorable, if in Karathanos the affidavit could not stand, it can stand much less in the instant.

Further, if the actions of the INS agents were constitutionally unlawful stops and interrogations of all persons coming out of or going into the restaurant, a major question for this Court is whether the evidence thus obtained is admissible against Petitioner. The Fifth Circuit glossed over the question of the constitutionality of the government "area control operations" which consist of physically surrounding the "target" and questioning all persons attempting to leave or enter the area, by observing only that "a parking lot is a public place". *Mauro Cantu* at 5413.

An examination of the facts of this case discloses conclusively that the connection between the lawless conduct of the INS and the discovery of the chal-

lenged evidence is so intertwined as to constitute tainted evidence. *United States v. Houlton*, 525 F. 2d 943 (5th Cir. 1976). If so, then the holding of the appellate court on this point is in conflict with that of the Seventh Circuit in the case of *Illinois Migrant Council v. Pilliod*, 540 F. 2d 1062 (7th Cir. 1976).

In that case, the Court held that ". . . a street stop is justifiable here only when the INS agent has a 'reasonable suspicion based on specific articulable facts that such person is an alien (unlawfully) in the (United States)." The Court further noted that *United States v. Martinez-Fuerte*, 428 U.S. 543, 49 L.Ed.2d 1116, 96 S. Ct. 3074 (1976), which held that government agents did not need reasonable suspicion to stop cars at permanent border checkpoints for the purpose of asking occupants about their residence, did "not apply either to searches of dwellings ... or street stops of individuals." The "area control operations" of the INS, such as were used in the instant case, are legally far removed from the permanent border checkpoints considered in *Martinez-Fuerte*, and in fact constitute intrusions more aggravated than the roving patrols declared unconstitutional in *Brignoni-Ponce*, or the ordinary street stops invalidated in *Illinois Migrant Council v. Pilliod*.

The general rule on warrantless searches is that they are per se unreasonable under the Fourth Amendment, subject only to a few specifically delineated exceptions. *Coolidge v. New Hampshire*, 403 U.S. 443, ___ L.Ed.2d ___, ___ S.Ct. ___ (1960).

Hot Pursuit cases, searches with consent, regulated industry, and stop and frisk cases are among those exceptions to the general rule. The case of *Terry v. Ohio*,

392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968) held that an exception to the warrant requirement was found where the police officer had a reasonable belief that the suspect was armed and dangerous.

The regulated industries exception is one with which we are not here concerned.

A warrantless search may be made if done with the person's consent if the consent is voluntary. *Amos v. U.S.*, 255 U.S. 313, ___ L.Ed. 2d ___, ___ S.Ct. ___ (1921). Again, this exception is clearly inapplicable.

A search warrant is not a prerequisite to a valid search at an international border. *Almeida-Sanchez v. United States*, 413 U.S. 37, ___ L.Ed. 2d ___, ___ S.Ct. ___ (1973). This certainly was not a case involving any international border. Other exceptions to the general rule are similarly inapplicable in the present case.

Not falling within any of the recognized exceptions, the actions of the INS in systematically stopping and interrogating all persons entering or leaving the "parking lot" must be measured by the standards of the general rule. Under *Brignoni-Ponce*, the Court firmly established the Principle

> "The two basic principles established in *Brignoni-Ponce* have universal applicability to all situations where aliens or other persons are to be temporarily 'seized,' interrogated, and perhaps arrested. First, foreign

appearance alone will not justify a reasonable belief that a person is an alien."
"Searching for Illegal Aliens", 13 San Diego L. Rev. 82, p. 106.

"Secondly, the Court firmly established the principle that to merely stop and interrogate one believed to be an alien constitutes a seizure of the person within the meaning of the fourth amendment, and therefore must be predicated on reasonable suspicion." *Id.* at p. 106.

"It would involve a strained logic, however, to conclude that the Court meant to exclude the "founded suspicion" test from interrogations conducted at fixed checkpoints removed from the border, or to suggest that the test was inapposite to urban immigration interrogations." *Id.* at p. 105.

Systematic stops and interrogations such as lead to the prosecution of this case are clearly not based on any "reasonable suspicion" regarding any individual stopped, and are thus patently unconstitutional.

Question Three

The United States Supreme Court, in *U.S. v. Evans*, 333 U.S. 483, ___ L.Ed. ___, 68 S.Ct. 634 (1948), considered whether 8 U.S.C.A. § 1324 proscribed only those offenses which comprised the smuggling process, or whether the harboring and concealing provision was intended to be given a much broader construction to which the language, if taken literally, was arguably susceptible.

The Defendant in *Evans* had been charged under § 1324 with harboring and concealing aliens. He contended successfully in the District Court that the statute did not provide a penalty for that particular offense, and the government appealed. The Supreme Court noted that the statute was clearly intended to make harboring and concealing criminal, and that it was their duty to uphold any reasonable penalty provision:

> . . . where Congress has exhibited clearly the purpose to proscribe conduct within its power to make criminal and has not altogether omitted provision for penalty, every reasonable presumption attaches. (p. 640).

However, the Court in *Evans* could not be sure that Congress intended to add the same penalty to harboring as it had set out for the bringing in or landing of aliens provision of 8 U.S.C.A. § 1324, as the grammatical construction of the statute permitted several possible interpretations of the relationship between the acts proscribed and the penalties set out. Moreover, the Court could not even be sure whether harboring was meant to encompass only those acts when closely connected with bringing in or landing.

The Court found that the manner of applying the penal provisions are to a large degree affected by the acts intended to be proscribed by the statute. Some applications of the penal provisions are harsher than others, and might be the ones intended if the acts proscribed are those which comprise the smuggling process.

> (The uncertainty) includes within varying ranges at least possible, and we think substantial, doubt over the section's reach to bring in very different acts which conceivably might be held to be concealing or harboring. The latter ambiguity affects the former and their sum makes a task for us which at best could only be guesswork.
> *Evans*, at 640-641.

The Court did not need to rule on the scope of § 1324 in *Evans*, as that question was not before them, but it did see the legislative history of the 1917 amendment as some evidence that: "the addition of concealing or harboring was meant to be limited to those acts only when closely connected with bringing in or landing so as to make a chain of offenses consisting of successive stages in the smuggling process", by noting that the Senate Report accompanying the 1917 statute stated that "such new provisions as are included are merely to *complete the definition of smuggling aliens* into the United States and related offenses". (emphasis added).

Congress clarified and reiterated its intent to proscribe the elements of the smuggling process in its extensive re-examination and overhaul of the entire Immigration and Naturalization system made subsequent to the decision in *Evans*. On July 26, 1947 the Senate passed Senate Resolution 137 directing the Senate Committee on the Judiciary to make a full and complete investigation of the immigration system, and the actual investigations began July 7, 1948. Voluminous data was compiled from the Immigration and Naturalization Service, Department of State, and other governmental and non-governmental

organizations interested in the immigration system. The result of the investigation was Senate Report 1515, an 801 page document, which was the basic working document of the Congress for the Immigration Act of 1952. The section of the report dealing with § 1324 uses language which clearly shows that Congress proceeded on the assumption that § 1324 encompassed only the smuggling process. That section reads as follows:

> a. Illegally importing, landing, or harboring aliens
>
> (1) Smuggling and harboring SMUGGLED aliens the most important and the most used penal provision of the immigration laws relating to the smuggling of aliens and the harboring of SMUGGLED aliens is section 8 of the Immigration and Naturalization Act of 1917. This section covers ALL PHASES OF SMUGGLING and makes it a misdemeanor for any citizen or alien to bring into . . . (emphasis added).

Thus, after the court in *Evans* expressed concern over possible ambiguous interpretations of the harboring and concealing language in view of the evidence indicating it was meant to apply only to acts in the smuggling process, *Congress reaffirmed its assumption that under § 1324 concealing an alien is proscribed only when it is part of the smuggling chain of events.*

It is true that in the case of *United States v. Lopez*, 521 F. 2d 437 (2d Cir., 1975), the Court rejected the contention that only acts which were part of the smuggling process were proscribed, stating that . . . members of Congress appear to have assumed that one providing shelter with knowledge of the alien's illegal presence would violate the Act, and there was no suggestion that only conduct forming part of the smuggling process should be proscribed." However, this reasoning is directly contradicted by Senate Report 1515 supra, which was apparently not brought to the attention of the Court.

Congress, in the 1952 revision of the section, also changed the crime from a misdemeanor to a felony, an indication that the statute was aimed at serious crime in keeping with the gravity of smuggling. That reclassification similarly indicates that the lesser conduct discussed in *Evans* was not included within the reach of that section.

The only conclusion from all the evidence is that prior to the 1952 revisions, § 1324 proscribed only acts closely related to smuggling, and that in the 1952 revision Congress assumed a continuance of the scope of the section. With a continuation of the basic statutory language and legislative history reflecting a concern with smuggling and defining penalties for the various phases of the smuggling process, it should not be lightly inferred that the 1952 revision was intended to expand § 1324 *to encompass acts entirely disconnected from the smuggling process.*

Petitioner urges, therefore, that the evidence in the instant case being devoid of any acts on his part that could possibly connote an activity or involvement —

directly or indirectly — in the smuggling process, his conviction should be reversed for this further reason.

The holding of the Fifth Circuit below is tantamount to an erosion of Petitioner's First, Fourth, and Fourteenth Amendment Rights, as well as those of other citizens in that circuit.

Due process of the law has been denied to the Petitioner in light of the fact that the legal nexus, necessary to support a finding of guilt, was never established between the alleged violations of the statute and the proven actions of the Petitioner.

Assuming arguendo that Petitioner Cantu knew his employees to be illegal aliens, that is not sufficient to support a conviction. 8 U.S.C.A. § 1324 (a)(3); *United States v. Karathanos*. Further the government's witness, Ignacio Perez, unequivocally stated that there was no agreement (Tr. 178). The alleged co-conspirators Perez and Morton agreed to provide transportation to two individuals, not two aliens (Appellees Brief, p. 45) (Tr. 177-178).

It cannot be assumed that the co-conspirators would know of anyone's alleged illegal status merely because they spoke only Spanish, though the government and the Fifth Circuit apparently assumed so. *United States v. Brignoni-Ponce*, (supra); *United States v. Mallides*, 473 F. 2d 859 (9th Cir. 1973); *Illinois Migrant Council v. Pilliod*, (supra); *United States v. Karathanos* (supra).

Petitioner complains that the government suppressed the grand jury testimony of Scott Jerome Morton and Billy T. Morton. Transcripts of their testimony before the grand jury is in the record, (see Vol. IV, Government Exhibits 2 and 8) and contravenes the assertions by the government that there was an agreement between Mr. Morton and Petitioner.

An overt act without proof of agreement among the parties is not sufficient to establish a conspiracy. *United States v. Williams*, 503 F. 2d 50, (6th Cir., 1974); *United States v. Craig*, 522 F. 2d 29 (6th Cir., 1975); *United States v. Crockett*, 534 F. 2d 589 (5th Cir., 1976); *United States v. Falcone*, 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128; *United States v. Zuideweld*, 316 F. 2d 873 (7th Cir., 1963); *United States v. Hernandez-Carreras*, 451 F. 2d 1315 (9th Cir., 1971).

The actors in a conspiracy must have the same intent that would be required to support conviction of the substantive offense, *Ingram v. United States*, 360 U.S. 672, 79 S.Ct. 1314, 3 L.Ed.2d 1503 (1959) and *United States v. Vilhotti*, 452 F. 2d 1186 (2nd Cir., 1971), and proof of knowledge of the conspiracy's illegal purpose is an essential element of the offense. *United States v. Bradley*, 455 F. 2d 1181, (1st Cir., 1972) cert. denied. Thus, if neither of the alleged co-conspirators was shown to have knowledge of an illegal purpose or that the aliens — Lucio Emilio Martines-Hernandez and Armando Bustamente-Hernandez — were in fact illegal aliens, then Petitioner could not be found guilty under the conspiracy count and Petitioner submits that the record before the court is devoid of the requisite proof needed by the government to support the conviction.

Petitioner notes at this point that it would be a strange course of action in shielding anyone to send that person being shielded into the waiting arms of those shielded against, as was done in the instant.

The evidence obtained as a result of the illegal search *cannot* be used to support and lend credibility to a search warrant whose supporting affidavit does not meet the test of *Aguilar* (supra) or that of the Second Circuit in *Karathanos*, under like circumstances. Id. at 31.

A final note is to be found in the opinion of the Second Circuit:

> "In the present case, there is a close connection between the initial illegal search and the testimony which the government seeks to use at trial. The purpose of the search, as described in the application for the warrant, was to seize the illegal aliens; it is the same aliens who are now the government's prospective witnesses. Once the aliens were arrested, the INS agents had obtained considerable leverage over them, since it was within the government's discretion to prosecute and deport them, or to allow them to leave the United States voluntarily. See 8 U.S.C. § 1252(b). If deported, the aliens would be permanently ineligible to receive visas to re-enter the country, see 8 U.S.C. § 1182(a)(17), while voluntary departure at one's own expense carries no similar penalty of permanent exclusion . . . In these circumstances, we think their decisions to testify cannot accurately be characterized

> as intervening "act(s) of free will" of sufficient independence "to purge the primary taint of the unlawful invasion." *Wong Sun v. United States*, supra, 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 417. The testimony is the not unpredictable result of the influence which the government possessed over the aliens once they had been arrested during the initial illegal search, and if such reasonably foreseeable fruits of the search were deemed admissible, it might help induce similar future searches without probable cause in the hope that they would uncover aliens who could be similarly prompted to testify. (Id. at 35).

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

Counsel for Petitioner
1014 San Pedro Avenue
San Antonio, Texas

CERTIFICATE OF SERVICE

I, Peter Torres, Jr., a member of the Bar of the Supreme Court of the U.S. and counsel of record for Mauro Cantu, Petitioner herein, hereby certify that on November ____, 1977 pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Petition for Writ of Certiorari on each of the parties herein, as follows:

On Ms. LeRoy Morgan Jahn, Assistant United States Attorney for the Western District of Texas, by depositing such copies in the U.S. Post Office, San Antonio, Texas, with first class postage prepaid, certified properly addressed to the Post Office address of Ms. LeRoy Morgan Jahn, Counsel of Record, at P.O. Box 1701, San Antonio, Texas, on the Solicitor General Mr. Wade H. McCree, Department of Justice, Washington, D.C. 20530.

All parties required to be served have been served.

Dated November ____, 1977.

PETER TORRES, JR.
1014 San Pedro Avenue
San Antonio, Texas 78212
223-1464 or 223-1708

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-4039

D.C. Docket No. SA-76-CR-100

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MAURO CANTU, JR., a/k/a Mario Cantu,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

Before THORNBERRY, AINSWORTH and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

August 22, 1977

Issued as Mandate:

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellee,

v.

Mauro CANTU, Jr., a/k/a Mario Cantu, Defendant-Appellant.

No. 76-4039.

United States Court of Appeals, Fifth Circuit.

Aug. 22, 1977.

The United States District Court for the Western District of Texas, John H. Wood, Jr., J., convicted defendant of conspiracy and of shielding illegal aliens from detection, and defendant appealed. The Court of Appeals, Ainsworth, Circuit Judge, held that: (1) conspiracy charge did not merge with substantive counts; (2) the word "shield" as used in the indictment was not overbroad; (3) defendant failed to establish prima facie case of discriminatory enforcement of statute prohibiting shielding illegal aliens; (4) trial court did not abuse its discretion in overruling motion for bill of particulars; (5) trial court did not err in denying discovery of past jury questionaires; (6) trial court properly denied request for immigration files; (7) Government's failure to provide defendant with allegedly exculpatory statement made by certain witness did not warrant reversal; (8) trial court did not err in denying motion to suppress evidence; (9) trial court did not abuse its discretion in refusing to grant pretrial conference; (10) evidence was sufficient to sustain conviction, and (11) trial court did not err in omitting from its charge the word "hide" as a synonym for "shield from detection."

Affirmed.

1. Criminal Law ⇐29

Test to determine whether two alleged offenses are in fact one is whether each provision requires proof of a fact which the other does not; it is enough if there is one element required to prove the offense charged in one count which is not required to prove the other.

2. Conspiracy ⇐24, 28(2)

Essence of the crime of "conspiracy" is the agreement rather than the commission of the objective substantive crime; conspiring to commit a crime is an offense separate and distinct from the crime which may be the object of the "conspiracy." 18 U.S.C.A. § 371.

See publication Words and Phrases for other judicial constructions and definitions.

3. Conspiracy ⇐37

In prosecution for shielding illegal aliens from detection and for conspiracy, in view of fact that conspiracy count required proof of agreement while substantive counts did not, conspiracy count did not merge with substantive counts. 18 U.S.C.A. § 371; Immigration and Nationality Act, § 274(a)(3), 8 U.S.C.A. § 1324(a)(3); U.S.C.A.Const. Amend. 5.

4. Indictment and Information ⇐71.-4(1)

In prosecution for shielding illegal aliens from detection, use of the word "shield" in indictment did not render indictment invalid as overbroad, in view of fact that the word "shield" was taken directly from statute defining offense and in view of fact that statute did not omit any essential element of the offense. Immigration and Nationality Act, § 274, 8 U.S.C.A. § 1324.

5. Criminal Law ⇐31

In prosecution for shielding illegal aliens from detection, defendant failed to establish prima facie case of discriminatory enforcement of statute, despite assertion that other employers employed illegal aliens. Immigration and Nationality Act, § 274, 8 U.S.C.A. § 1324.

6. Indictment and Information ⇐121.-1(1)

Purpose of bill of particulars is to inform defendant of the charge against him with sufficient precision to allow him to prepare his defense, to minimize surprise at trial, and to enable double jeopardy to be pleaded in case of a later prosecution.

7. Criminal Law ⇐1149
Indictment and Information ⇐121.-1(3)

Whether to grant motion for bill of particulars is within discretion of trial judge, and this discretion will be overturned only upon a showing that the defendant was actually surprised at trial or was otherwise prejudiced, so that a clear abuse of discretion by trial judge is shown.

8. Indictment and Information ⇐121.-2(1)

In prosecution for shielding illegal aliens from detection, trial court did not abuse its discretion in overruling defendant's motion for bill of particulars, in view of fact that evidence consisted mainly of reports by witnesses of conversations in which defendant participated and in view of fact that defendant was fairly apprised of Government's theories and particulars upon which each count of the indictment was based. Immigration and Nationality Act, § 274, 8 U.S.C.A. § 1324.

9. Criminal Law ⇐627.6(2)

In prosecution for shielding illegal aliens from detection, trial court did not err in denying discovery of past jury questionaires, in view of fact that trial judge allowed defendant to investigate records concerning persons making up grand and petit juries in defendant's case.

10. Criminal Law ⇐627.6(2)

In prosecution for shielding illegal aliens from detection, trial court properly exercised its discretion in denying defendant bill of discovery for immigration files. 5 U.S.C.A. § 552(b); Immigration and Nationality Act, § 274, 8 U.S.C.A. § 1324.

11. Criminal Law ⇐627.7(4)

Where witness' statement to investigator was not exculpatory as to defendant but could have been useful to defense only to impeach witness had he been called, where witness was not called to testify, and where Government was aware that witness had repudiated his prior testimony before Government received defendant's request for *Brady* material, Government's failure to provide statement of witness to defendant did not reduce trial to one which did not comport with standards of justice. Immigration and Nationality Act, § 274, 8 U.S.C.A. § 1324.

12. Criminal Law ⇐394.1(2)

In prosecution for shielding illegal aliens from detection, trial court did not err in denying defendant's motion to suppress testimony of aliens detained in defendant's restaurant, in view of fact that detention took place in defendant's restaurant parking lot which was a "public place."

13. Arrest ⇐66

For purpose of determining legality of arrest of aliens in defendant's parking lot, parking lot was a "public place."

See publication Words and Phrases for other judicial constructions and definitions.

14. Criminal Law ⇐632

In prosecution for shielding illegal aliens from detection, trial court did not abuse its discretion in denying pretrial conference.

15. Criminal Law ⇐632

Whether to grant a pretrial conference is in the discretion of the district judge.

16. Conspiracy ⇐47(3)

In prosecution for conspiracy to hide illegal aliens, evidence was sufficient to sustain conviction. 18 U.S.C.A. § 371.

17. Aliens ⇐56

Under statute providing penalties for any person who willfully or knowingly attempts to conceal, harbor, or shield from detection, in any place, any illegal alien, fact that illegal aliens were arrested outside rather than inside defendant's restaurant did not preclude prosecution of defendant. Immigration and Nationality Act, § 274, 8 U.S.C.A. § 1324.

18. Aliens ⇐56

Under statute providing penalties for any person who willfully or knowingly attempts to conceal, harbor, or shield from detection, in any place, any alien, the words "in any place" were meant to be broadly inclusive, not restrictive. Immigration and Nationality Act, § 274(a)(3), 8 U.S.C.A. § 1324(a)(3).

See publication Words and Phrases for other judicial constructions and definitions.

19. Aliens ⇐56

Statute prohibiting shielding illegal aliens from detection does not prohibit only smuggling-related activity, but also activity tending substantially to facilitate alien's remaining in the United States illegally. Immigration and Nationality Act, § 274, 8 U.S.C.A. § 1324.

20. Criminal Law ⇐805(1)

In prosecution for shielding illegal aliens from detection, trial judge did not err in omitting from his charge the word "hide" as a synonym for "shield from detection." Immigration and Nationality Act, § 274(a)(3), 8 U.S.C.A. § 1324(a)(3).

Appeal from the United States District Court for the Western District of Texas.

Before THORNBERRY, AINSWORTH and RONEY, Circuit Judges.

AINSWORTH, Circuit Judge:

Mauro Cantu, also known as Mario Cantu, was convicted by a jury of conspiracy and of two substantive counts of shielding illegal aliens from detection, violations of 18 U.S.C. § 371 and 8 U.S.C. § 1324. He was sentenced to a suspended prison term and a fine. Cantu appeals alleging numerous errors prior to and during trial. We have considered Cantu's points on appeal and find them to be without merit, and accordingly affirm the judgment of the district court.

In June of 1976 Cantu was proprietor of Mario's Restuarant in San Antonio, Texas. On information that Cantu employed aliens illegally in the United States at his restaurant, agents of the Immigration and Naturalization Service visited the restaurant on the morning of June 18, 1976 to question the employees about their residence status. Cantu refused to admit the agents without a search warrant. The agents remained outside the restaurant to await the arrival of a warrant.

One of the illegal aliens employed by Cantu on June 18 was Lucio Hernandez. Hernandez had worked for Cantu during a previous illegal visit to the United

States. When the INS agents arrived on the morning of the 18th, Hernandez took a seat in the dining room of the restaurant. Cantu approached a patron, Billy Morton, and asked him to give a ride to one of the employees. Morton agreed, and Cantu then pointed Morton out to Hernandez. Morton joined Hernandez, but the two could not converse due to the language barrier. A witness testified that Cantu made the arrangements with Morton. As Morton prepared to leave he indicated to Hernandez to join Morton's sons in a group. They left by the front door in single file. The agents approached Hernandez in the restaurant parking lot, ascertained his illegal status, and arrested him.

Another illegal alien employed by Cantu on June 18 was Armando Bustamante-Hernandez (referred to herein as Bustamante). Bustamante also had been employed by Cantu during a previous illegal visit to the United States. When the agents arrived on the 18th Bustamante changed from his waiter's costume into street clothing, and attempted to hide within the restaurant. Bustamante testified that Cantu told him not to hide, but to take a seat in the restaurant dining room. Bustamante further testified that Cantu then approached a patron, Ignacio Perez, and asked Perez to give Bustamante a ride into town. Perez testified that he was aware of the presence of the INS agents, aware that Bustamante was Cantu's employee, that he was aware that Cantu was reputed to employ illegals, and that it occurred to him that Bustamante might be illegal. Perez joined Bustamante and indicated that Bustamante was to leave with him. Bustamante testified that this was confirmed by a gesture from Cantu. As Bustamante and Perez passed the cashier's booth Perez obtained a toothpick which he gave to Bustamante, and Bustamante put the toothpick in his mouth. The two then left the restaurant together. In the restaurant parking lot agents approached Bustamante, ascertained his illegal status, and arrested him.

A third illegal alien employed by Cantu successfully evaded the agents at the restaurant by leaving with patrons. A fourth was arrested while taking garbage out a back door. A fifth was arrested within the restaurant after the search warrant arrived.

Cantu was indicted by a federal grand jury for conspiracy to "wilfully and knowingly attempt to shield" Bustamante and Hernandez, illegal aliens, in contravention of 18 U.S.C. § 371 and 8 U.S.C. § 1324(a)(3). Section 1324 provides in pertinent part:

> (a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—
>
> . . . . . .
>
> (3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation;
>
> . . . . . .
>
> any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony . . .: *Provided, however,* That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

Billy Morton and John Doe (Ignacio Perez) were named in the indictment as unindicted coconspirators, and were granted immunity from prosecution. The indictment charged as a conspiracy that Cantu held conversations with Morton and Doe/Perez to plan to enable "certain illegal aliens" to depart the restaurant under the guise of customers. The two substantive counts of the indictment charged attempts to "shield from detection" Hernandez and Bustamante pursuant to the charged conspiracy.

The cause was tried on September 7 and 8, 1976, and on September 9 the jury returned verdicts of guilty against Cantu on the conspiracy count and on both substantive counts. The district judge sentenced Cantu to a total of four years' imprisonment, suspended, five years' supervised probation, and a fine of $3,000, on all counts. Cantu then appealed.

On appeal Cantu contends that the indictment under which he was prosecuted was faulty; that the trial judge erred in denying various pretrial motions and in quashing certain subpoena; that there was insufficient evidence presented at trial to sustain a conviction under the indictment; and that the trial judge charged the jury incorrectly. We have examined each of Cantu's points on appeal and find them to be without merit.

[1-3] *Adequacy of the indictment.* Cantu contends that the evidence required to prove the conspiracy count in this case is the same as that required to prove the substantive counts, and that the fifth amendment forbids trial on separate counts for the same acts. The test to determine whether two alleged offenses are in fact one is whether each provision requires proof of a fact which the other does not. It is enough if there is one element required to prove the offense charged in one count which is not required to prove the other. *United States v. Bruce*, 5 Cir., 1973, 488 F.2d 1224, 1229-30. A conviction for conspiracy under the first count of the indictment in this case requires an agreement to conspire, 18 U.S.C. § 371. "The essence of the crime of conspiracy is the agreement rather than the commission of the objective substantive crime. Conspiring to commit a crime is an offense separate and distinct from the crime which may be the object of the conspiracy." *United States v. Nims*, 5 Cir., 1975, 524 F.2d 123, 126, *cert. denied*, 426 U.S. 934, 96 S.Ct. 2646, 49 L.Ed.2d 385. The required proof of agreement is an element not required to be proved for the substantive counts under 8 U.S.C. § 1324(a)(3). The conspiracy does not merge, therefore, with the substantive counts as argued by Cantu.

Denial of motion to dismiss the indictment. Cantu contends that the district judge erred in refusing to grant Cantu's motion to dismiss the indictment. Cantu asserts that the word "shield" in the indictment is overbroad, that the grand jury which returned the indictment was illegally composed, and that the indictment against Cantu resulted from discriminatory enforcement of the immigration laws.

[4] Cantu asserts that "men of common knowledge would naturally have to guess at the meaning of [shield] and would differ as to its application as did counsel for both sides and the trial judge in the instant case." We have held, however, that indictments are valid where they track the language of the appropriate statute unless "the statute omits an essential element of the offense." *United States v. Thevis*, 5 Cir., 1973, 484 F.2d 1149, 1152, *cert. denied*, 419 U.S. 886, 95 S.Ct. 158, 42 L.Ed.2d 129 (1974). In this case, the word complained of, "shield," is taken directly from the statute and it does not appear that the statute omits any essential element of the offense. Therefore, the choice of language in the indictment does not render the indictment invalid.

Cantu asserts that the grand jury which indicted him did not constitute a fair and representative cross section of the community. Cantu concedes in his brief on appeal that he did not carry his burden to make a prima facie case of illegal jury composition but asserts that although he "sought through discovery to obtain the factual materials necessary for proof and specifically asked that he be permitted to inspect and copy the jury questionnaire forms" his discovery request was denied by the district judge. Cantu asserts that this denial was error. The record shows that in denying Cantu's motion for discovery of the jury questionnaire forms the district judge informed Cantu in his order of August 16 that Cantu was "free without further order of this Court to examine the records which the United States District Clerk keeps in the regular course of business concerning the identity of those persons making up both the present and past Grand and Petit Juries." Thus this point of error is clearly without merit.

Cantu asserts that he has been the target of discriminatory enforcement of the laws in contravention of the fourteenth amendment and that the district judge erred both in overruling a motion to dismiss without taking evidence on this issue, and in granting the government's motion in limine precluding Cantu from presenting testimony on the issue. In support of this argument Cantu cites *United States v. Falk*, 7 Cir., 1973, 479 F.2d 616. In *Falk* relief was granted to the defendant by the court of appeals after a district court had convicted Falk of failing to possess a draft card. The court found that there were "several indications" that Falk had been singled out for prosecution because of his active involvement in advising others on methods of legally avoiding military service and in protesting American actions in Vietnam. This infringement on Falk's first amendment rights was found to be "invidious discrimination which cannot be reconciled with the principles of equal protection." 479 F.2d at 624.

[5] Cantu asserts that other employers of illegal aliens are not being prosecuted under section 1324, and that in effect his own prosecution is designed to chill his first amendment rights as a member of CASA, an organization assisting illegal aliens in this country. In his motion to dismiss Cantu identifies businesses which he alleges employ illegal aliens, none of which has been charged with "shielding." Section 1324, however, explicitly exempts employment of illegal aliens from its strictures. An assertion that other employers employ aliens is therefore not equivalent to an assertion that another "shields" aliens. Cantu makes no assertion and offers no proof that other employers shield aliens in the manner of which he is accused or in any other. Therefore, Cantu has made out no prima facie case of discriminatory enforcement, and the trial judge did not err in dismissing his motion.

[6, 7] *Denial of motion for a bill of particulars.* Cantu asserts that the trial judge erred in overruling his motion for a bill of particulars. The purpose of a bill of particulars is to inform the defendant of the charge against him with sufficient precision to allow him to prepare his defense and to minimize surprise at trial, *United States v. Sherriff*, 5 Cir., 1977, 546 F.2d 604, 606; also, to enable double jeopardy to be pleaded in

case of a later prosecution, *United States v. Mackey*, 5 Cir., 1977, 551 F.2d 967, 970. Whether to grant a motion for such a bill is within the discretion of the trial judge and this discretion will be overturned only upon a showing that the defendant was actually surprised at trial, *Mackey, supra*, 551 F.2d at 970, or was otherwise prejudiced, *United States v. Bearden*, 5 Cir., 1970, 423 F.2d 805, 809, *cert. denied*, 400 U.S. 836, 91 S.Ct. 73, 27 L.Ed.2d 68 (1970), so that a clear abuse of discretion by the trial judge is shown.

[8] In the present case the evidence consisted mainly of reports by witnesses of conversations in which Cantu participated, of activity in Cantu's restaurant which he witnessed and of the arrests in the restaurant parking lot, which he also witnessed. Thus Cantu "could hardly have been surprised by the government's proof at trial." *United States v. Pena*, 5 Cir., 1976, 542 F.2d 293, 294. Cantu does not attempt to show surprise or other prejudice resulting from the denial of the bill. Accordingly, there was no abuse of discretion, *United States v. Pena, supra*, 542 F.2d at 294. The record discloses that Cantu was fairly apprised of the government's theories and particulars upon which each count of the indictment was based. "He was entitled to no more." *United States v. Bearden, supra*, 423 F.2d at 809.

[9] *The motion for discovery.* In paragraph 23 of his motion for discovery Cantu moved "for an order to examine the questionnaires submitted by Grand Jurors called for Grand Jury service in the Western District of Texas for the preceding five (5) years and similarly requests that he be permitted to examine and inspect and copy the lists of petit jurors called for the instant case and those called for the preceding four (4) years." Cantu asserted that this discovery was necessary to allow him to show that the grand jury which indicted him did not represent a fair cross section of the community. In his order of August 16 in response to Cantu's discovery motion the district judge said that

> the defendant is free without further Order of this Court to examine the records which the United States District Clerk keeps in the regular course of business concerning the identity of those persons making up both the present and past Grand and Petit Juries. However, in the present posture of the case, the Court does not recognize any necessity for the defendant to examine the Questionnaires submitted by Grand Jurors called for Grand Jury service in the Western District of Texas for the preceding five years and the similar request regarding the Petit Jurors for the previous four years.

Cantu now asserts that his request for discovery of jury information was denied by the district judge, and that this denial was error. That portion of the district judge's order quoted above shows that he denied only Cantu's request for questionnaires returned by juries in past years. Cantu challenges only the juries which considered his case. We agree with the district judge that questionnaires returned by past juries are not necessary in the present posture of this case. To deny discovery of past jury questionnaires was not error in the circumstances.

[10] *The supplemental motion for discovery.* Cantu in a supplemental motion for discovery sought production of the immigration files of Hernandez, Bustamante and of "any and all aliens who will testify against the defendant Mario Cantu in this case." In his motion Cantu offered only the bald assertion that "this discovery is essential to the preparation of their [sic] defense herein." The district judge properly exercised his discretion in denying Cantu a bill of discovery for immigration files. *See* 5 U.S.C. § 552(b).

[11] *Alleged Brady violation.* Cantu asserts that the government possessed prior to trial an exculpatory statement made by Morton, which was not revealed to Cantu, thus violating the principles of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In his original discovery motion Cantu requested production of "all statements made by witnesses in this case . . . ." In response to this motion the district judge ordered that "[a]ny materials requested by the defendant in his Motion for discovery which fall under the requirements of the Jencks Act or *Brady v. Maryland* shall be made available to the defendant at the appropriate time." Cantu asserts that the Morton statement was never made available to him, and that he was thereby denied a fair trial.

The record contains a government file memorandum reflecting a government investigator's interview with Morton. The memo indicates that Morton told the investigator that Hernandez himself asked Morton for a ride to town, and that Cantu did not make this request of Morton. The transcript of Morton's testimony before the federal grand jury also appears in the record. Morton testified before the grand jury as follows:

> And to get the record straight, I'm under oath, Mr. Cantu, Mario, had asked me if I would give one of his men a ride to town.

Morton was not called as a witness by either side during the trial, although the record reflects that he was present and available to be called.

Cantu made the alleged suppression of Morton's statement to the investigator a basis of his motion for a new trial after the verdict was returned. This motion was argued to the district judge on September 27, 1976. Morton was sworn as a witness at this hearing. During the hearing Morton testified in response to a question from Cantu's attorney, "Mr. Cantu approached me and asked me if I would be courteous or kind enough to take one of his waiters to town." Shortly after, asked about the statement which he had given to the investigator, Morton testified,

> Secondly, he asked me if Mr. Cantu asked me to take Emilio out of the restaurant, and I said no, he did not. That was a false statement of course.

It thus appears that Morton's statement to the investigator was not exculpatory as to Cantu, but could have been useful to the defense only to impeach Morton had he been called. The government was aware that Morton had repudiated his statement to the investigator in sworn testimony before the grand jury, before receiving Cantu's request for *Brady* material, and therefore was aware that the earlier statement was not exculpatory as to Cantu. Morton has now twice confirmed this repudiation under oath. The government's failure to provide the statement to Cantu under these circumstances did not reduce the trial to one which did "not comport with standards of justice." *Brady v. Maryland, supra*, 373 U.S. at 87, 83 S.Ct. at 1197.

[12, 13] *Denial of the motion to suppress evidence.* Cantu asserts that he was arrested and charged on the basis of illegally obtained evidence, and that the trial court erred in denying his motion to suppress the testimony of the aliens detained at Cantu's restaurant and "all other fruits of illegal search." The indictment charging Cantu is based upon

the detention of aliens in Cantu's restaurant parking lot. A parking lot is a public place. *United States v. Sherriff, supra*, 546 F.2d at 607; *see United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976). This assignment of error is without merit.

[14, 15] *Denial of a pretrial conference.* Cantu contends that the district judge erred in not granting a pretrial conference "to consider proper disposition of a panoply of motions which were filed by Appellant" under Fed.R.Crim.P. 17.1. In support of this motion Cantu cites *United States v. Falk, supra*. The citation to *Falk* is inapposite, since in that case the remand was for an evidentiary hearing on Falk's allegation of discriminatory prosecution. 479 F.2d at 623–24. Whether to grant a pretrial conference is in the discretion of the district judge. We find no abuse of this discretion in the present record.

[16–18] *Sufficiency of the evidence.* Cantu contends that there was insufficient evidence presented to support a guilty verdict under the conspiracy or substantive counts of the indictment. Concerning the conspiracy count, the record reflects sufficient evidence from which the jury could correctly conclude that Morton and Perez entered into agreements with Cantu to perform acts which they knew were illegal. As to the substantive counts, Cantu asserts that because he did not instruct his alien employees to "hide" and because they left the restaurant by the main door in full view of the INS agents, there was no evidence of illegal shielding under the statute. 8 U.S.C. § 1324 provides penalties for any person who

> willfully or knowingly . . . attempts to conceal, harbor, or shield from detection, in any place . . . any alien . . . .

Cantu argues that because Hernandez and Bustamante were arrested outside rather than inside the restaurant, that the "in any place" requirement of the statute is not fulfilled. We reject this reading of the statute. Clearly the words "in any place" are meant to be broadly inclusive, not restrictive.

[19] Cantu further argues that Congress in enacting section 1324 intended to proscribe only activities which were "part of the smuggling [of aliens] chain of events." This argument was recently offered to the Second Circuit, which, after reviewing the statutory history of section 1324, concluded that "there was no suggestion that only conduct forming part of the smuggling process should be proscribed." *United States v. Lopez*, 2 Cir., 1975, 521 F.2d 437, 440, *cert. denied*, 423 U.S. 995, 96 S.Ct. 421, 46 L.Ed.2d 368 (1976). We agree with the conclusion in *Lopez* that section 1324 does not prohibit only smuggling-related activity, but also activity "tending substantially to facilitate an alien's 'remaining in the United States illegally.'" 521 F.2d at 441.

[20] *Jury instruction as to meaning of "shield."* Cantu requested that, in charging the jury concerning the meaning of "shield" as used in section 1324, the district judge include as a synonym the word "hide." The judge declined to include "hide," and Cantu contends that this refusal was error. Although "shield" and "hide" may in some contexts be synonymous, in the context of section 1324 they are not. Section 1324 forbids attempts "to conceal, harbor, or shield from detection." Were "shield from detection" used synonymously with "hide" then "conceal" would be redundant. Therefore, the district judge did not err in omitting from his charge "hide" as a synonym for "shield from detection."

Other errors assigned. Cantu asserts that the district judge erred in quashing subpoena naming Richard M. Nixon and others as associates in bringing an illegal alien into the United States; in denying Cantu's motions for continuance; and in failing to recuse himself. We have considered these points and find them to be without merit.

All of Cantu's points on appeal having been considered and rejected, we affirm the judgment of the district court.

AFFIRMED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

October 3, 1977

TO ALL PARTIES LISTED BELOW:

NO. 76-4039 — U.S.A. v. MAURO CANTU

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing,** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
Clerk
/s/ BRENDA M. HAUCK
Deputy Clerk

cc: Mr. Peter Torres, Jr.
Ms. LeRoy Morgan Jahn

** on behalf of appellant, Mauro Cantu, Jr.,

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

October 12, 1977

Mr. Peter Torres, Jr.
Attorney
1014 San Pedro Ave.
San Antonio, TX 78212

No. 76-4039 — USA v. Mauro Cantu, Jr., etc.

MANDATE STAYED TO AND INCLUDING
November 2, 1977
(SEE ORDER ENCLOSED)

Dear Counsel:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk
/s/ SUSAN M. GRAVOIS
Deputy Clerk

enc.

cc: Ms. LeRoy Morgan Jahn

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-4039

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MAURO CANTU, JR., a/k/a Mario Cantu,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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ORDER:

The motion of APPELLANT for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including November 2, 1977, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing

of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ ROBERT AINSWORTH
UNITED STATES CIRCUIT
JUDGE

[Filed: Oct. 12, 1977]

No. 77-641

In the Supreme Court of the United States

OCTOBER TERM, 1977

MAURO CANTU, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

SIDNEY M. GLAZER,
DEBORAH WATSON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-641

MAURO CANTU, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 557 F. 2d 1173.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1977 (Pet. App. A). A petition for rehearing was denied on October 3, 1977 (Pet. App. C). The petition for a writ of certiorari was filed on November 2, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the charge against petitioner was the result of impermissible selective prosecution.

2. Whether petitioner's motion to suppress evidence was properly denied.

3. Whether 8 U.S.C. 1324(a)(3), which makes it a crime to shield illegal aliens from detection, covers only activities that are part of the smuggling process.

4. Whether the evidence was sufficient to sustain petitioner's conviction.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of conspiracy and shielding illegal aliens from detection, in violation of 18 U.S.C. 371 (Count I) and 8 U.S.C. 1324 (Counts II and III). He was sentenced to four years' imprisonment and a $3000 fine (Pet. 5). The prison term was suspended, and petitioner was placed on probation for five years. The court of appeals affirmed (Pet. App. B).

The government's evidence at trial showed that on June 18, 1976, the Immigration and Naturalization Service received information that petitioner, the owner of a restaurant in San Antonio, Texas, was employing illegal aliens in his restaurant (Tr. 61-63). The same day, agents of the Service went to the restaurant to question the employees about their residence status (Tr. 75-76, 106-107). When petitioner refused to admit the agents without a search warrant (Tr. 112), the agents remained outside the restaurant to await the arrival of a warrant.

While the agents were awaiting the warrant, petitioner made arrangements for two of his employees to leave the restaurant immediately, accompanied by restaurant patrons. The two employees were both illegal aliens who had worked for petitioner during previous illegal visits to the United States (Tr. 64-65, 130-134, 186). One of the

patrons who was asked to escort an employee out of the restaurant admitted at trial that he knew the employee worked for petitioner, that he was aware that INS agents were outside the restaurant, and that he suspected the employee was an illegal alien (Tr. 171-174). The other patron, who had been dining with members of his family, first pretended to converse with the employee and then directed the employee to walk between his sons as they left the restaurant (Tr. 190). The agents arrested both aliens in the restaurant parking lot after determining their illegal status (Tr. 113-115, 139, 173, 190, 225).[1] On the basis of information obtained from the aliens at that time, the agents arrested petitioner as well.

ARGUMENT

1. Petitioner first contends (Pet. 7-13) that the government was guilty of "selective, discriminatory prosecution" and complains of the district court's refusal to grant a hearing at which he could develop the facts to support this allegation. Petitioner concedes, however, that "there was no tangible proof to present" to demonstrate selective prosecution (Pet. 11). Instead, in support of his claim, he offered at trial to present evidence that he was a member of a group that aided immigrant workers and that other employers had not been prosecuted for employing illegal aliens (Tr. 19-37).[2] As the court of

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[1]A third illegal alien was arrested outside the restaurant shortly after the INS agents arrived (Tr. 122, 254, 258, 301); a fourth illegal alien employed by petitioner successfully evaded the agents at the restaurant by leaving with patrons (Tr. 218-221); and a fifth was arrested inside the restaurant after the search warrant arrived (Tr. 118-119, 134, 256).

[2]When asked by the judge during the hearing, "What proof do you have of selective prosecution in this case for your bill that's hard, proveable [sic], cold evidence that selective prosecutions have been

appeals noted, however, merely employing illegal aliens does not violate Section 1324. Accordingly, petitioner's assertion that other employers were not prosecuted is irrelevant to his claim that he was selectively prosecuted for shielding illegal aliens from detection. Because petitioner failed to prove even a colorable entitlement to the defense of selective prosecution, the district court properly overruled his motion to dismiss the indictment.[3] See *United States* v. *Murdock*, 548 F. 2d 599 (C.A. 5); cf. *Oyler* v. *Boyles*, 368 U.S. 448.

2. Petitioner further contends (Pet. 13-19) that evidence obtained as a result of the search of his restaurant should have been suppressed because the affidavit upon which the search warrant was based failed to meet the test laid down by this Court in *Aguilar* v. *Texas*, 378 U.S. 108. He fails, however, to point to any evidence that was produced as a result of the allegedly improper search. In fact, the only product of the "search" of the restaurant was the arrest of another alien employee long after the arrest of the two aliens named in the indictment. And that employee was questioned and arrested in a public area of the restaurant (Tr. 67), as to which no search warrant would have been required in any event. See *United States* v. *Santana*, 427 U.S. 38; *United States* v. *Watson*, 423 U.S. 411.

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ordered or accomplished by the U.S. Attorney's office or by the Executive Branch or any other agency against Mr. Cantu" (Tr. 31), petitioner's counsel indicated that the testimony he intended to offer would show that "other people in South Texas and throughout the southwestern United States hire aliens and they are not charged with shielding" (Tr. 31-32).

[3]Petitioner's reliance on *United States* v. *Falk*, 479 F. 2d 616 (C.A. 7), *United States* v. *Steele*, 461 F. 2d 1148 (C.A. 9), and *United States* v. *Crowther*, 456 F. 2d 1074 (C.A. 4), is misplaced. In all of these cases the courts of appeals found that appellants had made out a *prima facie* case of discriminatory prosecution.

Petitioner also objects to the questioning and arrest of the two alien employees in the restaurant parking lot (Pet. 16-19), apparently on the theory that their detention led to his arrest. Petitioner, however, has no standing to assert that claim. The arrest of the alien employees "invaded no right of privacy of person or premises" of petitioner (*Wong Sun* v. *United States*, 371 U.S. 471, 492), since the arrest took place not within petitioner's restaurant, but outside in a parking lot open to the public.[4]

3. Petitioner next claims that 8 U.S.C. 1324(a)(3), the statute under which he was charged, is limited to activities that are part of the process of smuggling aliens into this country. On its face, however, the statute reaches all acts of knowingly concealing, harboring or shielding illegal aliens from detection. Nothing in the statute or in its legislative history suggests that its coverage is limited to actions related to bringing aliens into the United States.[5]

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[4]In any event, the detention and questioning of these aliens was entirely proper. The INS agents had received information that numerous aliens who had entered the United States illegally were working at petitioner's restaurant. In addition, the Service had previously apprehended illegal aliens employed by petitioner at his restaurant, including the two aliens stopped in the parking lot, who had worked for petitioner during a prior illegal visit to the United States (Pet. App. 4a, 5a). These factors constituted specific articulable facts reasonably warranting suspicion, that the two aliens were illegally in the United States. See *Shu Fuk Cheung* v. *Immigration and Naturalization Service*, 476 F. 2d 1180 (C.A. 8); *Au Yi Lau* v. *United States Immigration and Naturalization Service*, 445 F. 2d 217 (C.A. D.C.), certiorari denied, 404 U.S. 864; *Yam Sang Kwai* v. *Immigration and Naturalization Service*, 411 F. 2d 683 (C.A. D.C.), certiorari denied, 396 U.S. 877. The questioning of the two aliens disclosed their illegal status, thus furnishing the immigration officers with probable cause to arrest.

[5]The legislative history of Section 1324 makes it clear that the purposes of that Section extend beyond merely preventing smuggling of aliens. Both the House and Senate reports characterized the

The two other circuits that have considered this precise question have similarly refused to limit the scope of Section 1324 to the smuggling process. See *United States* v. *Acosta de Evans*, 531 F. 2d 428, 430, n. 4 (C.A. 9), certiorari denied, 422 U.S. 1010; *United States* v. *Lopez*, 521 F. 2d 437, 440 (C.A. 2), certiorari denied, 423 U.S. 995. As the Second Circuit stated in *Lopez, supra*, 521 F. 2d at 440:

> At least two provisions in the statute as finally enacted are inconsistent with an intent to limit the prohibition to conduct connected with the smuggling of the alien into the United States. The first is a proviso in §1324(a)(2) to the effect that in order to be guilty of knowingly transporting an illegal alien the person charged must "have reasonable grounds to believe that [the alien's] entry into the United States occurred less than three years prior thereto." Transportation at a point in time so long after the illegal entry would not normally be in furtherance of the smuggling process, which would long since have been completed. Secondly, Congress expressly provided that "for purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring." Since such employment would not normally be related to the smuggling process this exemption would, under Lopez's construction, be unnecessary.

purposes of the statute as being to prevent aliens "from entering *or remaining* in the United States illegally." S. Rep. No. 1145, 82d Cong., 2d Sess. 2 (1952); H.R. Rep. No. 1377, 82d Cong., 2d Sess. 1 (1952). The language from the Senate Report on which petitioner relies (Pet. 22), S. Rep. No. 1515, 81st Cong., 2d Sess. 644 (1950), was merely a characterization of the predecessor to Section 1324. Similarly, the case of *United States* v. *Evans*, 333 U.S. 483, on which petitioner appears to rely, was a construction of the same predecessor statute, not a construction of Section 1324, which was passed in part to remedy the restrictive reading of the *Evans* case.

4. Finally, petitioner contends (Pet. 24-26) that the evidence was insufficient to support his conviction of conspiracy and of shielding illegal aliens. The evidence adduced at trial, however, clearly established that petitioner knew of the aliens' illegal status and that the two patrons who were named as unindicted co-conspirators agreed, upon his request, to escort the aliens out of the restaurant in an apparent effort to guide them by the INS agents undetected. In light of the circumstances of their departure from the restaurant, it was reasonable for the jury to infer that both co-conspirators knew the illegal status of the aliens. Both men were aware that the INS had staked out the restaurant; both knew that the alien he was to escort out of the restuarant spoke only Spanish; and in fact, one of them admitted on the stand that he suspected his companion was an illegal alien (Tr. 174). The evidence was thus plainly sufficient to sustain petitioner's conviction for both conspiracy and the substantive offenses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
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FEBRUARY 1978.

DOJ-1978-02